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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 32

JAMES R. HOFFA, *Petitioner*

v.

UNITED STATES

No. 33

THOMAS EWING PARKS, *Petitioner*

v.

UNITED STATES

No. 34

LARRY CAMPBELL, *Petitioner*

v.

UNITED STATES

No. 35

EWING KING, *Petitioner*

v.

UNITED STATES

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals in affirming Petitioners' convictions is reported at 349 F(2) 20, and is printed at R. 178-231.

JURISDICTIONAL STATEMENT

The judgments of the Court of Appeals, affirming Petitioners' convictions (R. 232-235) were entered on July 29, 1965. A timely petition for rehearing was denied on October 7, 1965. On October 18, 1965, Mr. Justice Stewart extended the time for the filing of Petitions for Certiorari for an additional thirty days to December 6, 1965. The Petitions for Certiorari were filed on December 3, 1965, and granted on January 31, 1966 (R. 241-244). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of the defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the Constitution provides, so far as is material here, that no person:

> . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

3. The Sixth Amendment to the Constitution provides, so far as is material here, that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

STATEMENT

The indictment in this proceeding charged the Petitioners, King, Hoffa, Campbell, and Parks with endeavoring to influence the petit jury in an earlier federal criminal proceeding against Petitioner Hoffa (R. 1).* For convenience we refer to this earlier proceeding as the Test Fleet case. The Test Fleet case ended with a hung jury. (R. 252).

Count I of the five-count indictment in this proceeding (R. 1-6) charged Petitioner Hoffa with conspiracy to influence jurors Tippens, Fields, and Paschal in the Test Fleet case. That count remains untried. The trial court ordered it severed as too prejudicial to the defendants in trial of the four substantive counts (R. 36).

The four substantive counts charged Petitioner Hoffa as abettor and one Medlin as principal in en-

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* "R" references are to the page of the Record printed for use in this Court. "T" references are to the pages of the trial transcript.

deavoring to influence juror Tippens (Count II);* Petitioners Hoffa and Campbell as abettors and Petitioner Parks as principal in endeavoring to influence juror Fields (Count III); Petitioner Hoffa and co-defendant Dorfman as abettors and co-defendant Tweel as principal in endeavoring to influence the Test Fleet jury through one Dallas Hall (Count IV); and Petitioner Hoffa as abettor and Petitioner King as principal in endeavoring to influence juror Paschal (Count V).**

The trial court directed a verdict on Count II (the juror Tippens count) (R. 55) and the jury acquitted on Count IV, the alleged endeavor of Petitioner Hoffa and co-defendants Dorfman and Tweel to reach the Test Fleet jury through Dallas Hall (T. 8868). Otherwise the jury convicted Petitioners as charged on Count III, the juror Fields count against Petitioners Hoffa, Campbell, and Parks; and on Count V, the juror Paschal count against Petitioners King and Hoffa. On each of those counts, Petitioner Hoffa was sentenced to four years and a fine of $5,000, the sentences to run consecutively (R. 121). Petitioners King, Parks, and Campbell were each sentenced to three years (R. 122-124).

The Court of Appeals for the Sixth Circuit affirmed (R. 232-235). This Court granted certiorari (R. 241-244) on the question:

> Whether evidence obtained by the Government by means of deceptively placing a secret informer

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* Medlin was not tried in this proceeding.

** Tippens, Fields, and Paschal were all excused from participation in the jury which disagreed in the Test Fleet case (R. 250).

in the quarters and councils of the defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.

The question concerns the activities in behalf of the Federal Government of Edward Grady Partin, a secret informer. He was the Government's chief witness at the trial of this case, and the only witness to connect Petitioner Hoffa with jury tampering in the Test Fleet case. Partin testified to a series of incriminating admissions by Petitioners King and Hoffa which implicated all Petitioners. The admissions, denied by Petitioners King and Hoffa (R. 1354 *et seq.;* 1151 *et seq.*) were, according to Partin, obtained by him in the course of his operations as a secret Government informer. We now set forth the facts of Partin's retention by the Government as its informer in relation to the Petitioners, the work he did in that capacity, the places in which he performed the work, and the compensation he was paid.

(a) Partin's Retention by the Government as Its Informer

In late September 1962, Partin, a local Teamster official in Baton Rouge, Louisiana (R. 254-255), was in jail in Baton Rouge on a State kidnapping charge (R. 631). His application for bail had been successfully opposed by the Parish District Attorney, Sargent Pitcher (R. 1335-1336). At the same time, Partin was under a 26-count Federal indictment for embezzlement of union funds (R. 1344, 629-630), and under State indictments for manslaughter, perjury, and assault (R. 1342-1343, 598-599, 634-635). Frank

Grimsley, a Department of Justice attorney, was assigned to prosecution of the embezzlement case (R. 1107-1108, 1167, 1309-1311).

In the foregoing circumstances, Partin told District Attorney Pitcher and his assistant, William Daniels, of an alleged plot by Petitioner Hoffa to assassinate the then Attorney General, Robert Kennedy, and asked to speak with a Federal Department of Justice official (R. 606, 1334, 368-369). Pitcher informed Grimsley who immediately called Grimsley's superior, Walter J. Sheridan (R. 1553, 1476, 1478). Sheridan, a non-lawyer special consultant to the United States Attorney General, was then actively assisting in the impending prosecution of Petitioner Hoffa in the Test Fleet case. Pursuant to Sheridan's instructions (R. 1553), Grimsley arranged to meet in Pitcher's office with Partin, Peter Duffy, an Assistant United States Attorney, Pitcher, and Daniels. The meeting started at three o'clock in the morning of October second, and lasted three hours. To the best of Grimsley's recollection, Partin began his work as a Federal Government informer at this meeting (R. 1201-1202). Grimsley reported the results of the meeting to Sheridan (R. 369-370, 1107-1108, 1554). At that point, Grimsley's duties with respect to the alleged assassination plot were over as the matter went to the F.B.I. for investigation (R. 1555-1556). Nevertheless, Grimsley spoke further with Partin in Pitcher's office on two or three occasions (R. 1170).

Within three days of the meeting on October second, the Federal embezzlement case against Partin was continued on the Government's motion (R. 1442), and, in the State kidnapping case, Partin was released on bail on Pitcher's recommendation (R. 1335-1337).

Partin and Daniels went to a Baton Rouge motel where they stayed for three or four days and conferred from time to time. Their conferences concerned Petitioner Hoffa (R. 1108-1111). On October 8, from the motel, Partin in the presence of Daniels called Petitioner Hoffa in Newark, New Jersey. The conversation was recorded with Daniels' equipment and under his instructions (R. 1112).

Partin asked Petitioner Hoffa if he could meet with him and talk over some of Partin's problems:

> Partin: . . . I got a bonding company and all, what I was thinking, Jimmy, after I get this thing straightened out today and tomorrow and everything if you get an opportunity or something I would like to get with you and talk with you and talk this thing out.
>
> Hoffa: Well, I'll be here all week.
> (Ex. 215) (R. 1434)

Within two days, the recording of this telephone conversation was delivered to the Federal Government (R. 1120-1121). Promptly upon such delivery of the recording, Grimsley or Duffy, or both, conferred on October 10 with Daniels and Pitcher. The conference concerned Petitioner Hoffa (R. 1121-1122).

Trial in the Test Fleet prosecution against Petitioner Hoffa was to start, and did start in Nashville on October 22. Knowing that Petitioner Hoffa would be in Nashville for this trial, Partin telephoned him long distance on October 18, said he needed to see him, and successfully invited himself to meet with Petitioner Hoffa in Nashville at the time of the starting

of the trial (Ex. 216, R. 1437-1439).* This call was again made from the motel and recorded by Daniels who also listened in on the conversation (R. 1123-1126).** Daniels immediately advised Grimsley of Partin's arrangement to meet Petitioner Hoffa in Nashville at the beginning of the Test Fleet trial (R. 1126). Independently of Daniels, Partin did the same (R. 1485). Grimsley advised Sheridan (R. 1486, 1557-1558), as did Partin also (R. 846). Sheridan was going to be in Nashville "to assist in any way that I could in the presentation of the trial" (R. 1055). Sheridan instructed Grimsley to give Partin Sheridan's Nashville telephone number, and "to tell Mr. Partin that when he got to Nashville if he saw any evidence of jury tampering or other illegal activity to call me" (R. 1558).

Upon Grimsley's initiative and in accordance with arrangements made by him, Partin and Daniels made a plane trip from Baton Rouge to Atlanta to confer with Grimsley on October 20 (R. 1127-1129). At the conference, Partin told Grimsley that "he wanted to assist the Justice Department in any manner possible in its investigation of the illegal activities" of Petitioner Hoffa (R. 1627-1628). Grimsley gave Partin "instructions" (R. 1488) "to keep his eyes and ears open when he was in Nashville" and to report to Sheri-

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* Until late in the trial below, the defense did not succeed in extracting from the Government copies of Partin's calls to Petitioner Hoffa on October 8 and 18 (R. 1432-1441). Prior to that extraction, Partin testified that Petitioner Hoffa wanted to talk to him in Nashville, and told him to use a strike at Louisiana Creamery as an excuse for his being in Nashville if anyone questioned him (R. 691-692).

** Later the recording itself was delivered to the Federal Government (R. 1127).

dan "any attempts at witness intimidation or tampering with the jury" and "if he heard anything of interest" (R. 1488, 1132). Partin agreed (R. 271, 279-280).

When Partin was ready to go to Nashville, he telephoned Grimsley (R. 280). At Atlanta when changing planes, Partin called Grimsley again to tell him that he was on the way to Nashville (R. 809).

(b) Partin's Activities as a Secret Government Informer

Before his arrival at Nashville, Partin understood that he "had already been instructed to discover or to turn in . . . evidence that would substantiate . . . a violation of the law or jury tampering" or "something like that" (R. 790). He was to "observe" for evidence of illegal activity (R. 903). In these terms, when Partin went to Nashville, he "knew what I was looking for" (R. 945).

On his arrival in Nashville on October 22, the opening day of the Test Fleet trial, Partin checked in at the Andrew Jackson Hotel, and, to the best of his recollection, telephoned Sheridan to say: "I am here" (R. 781). Sheridan again instructed Partin on reporting jury tampering (R. 287). Partin then went to the hotel coffee shop to await Petitioner Hoffa. There he met a man who introduced himself as Anthony Quinn (R. 260). Later that same first day he went to Petitioner Hoffa's room to ask him if he knew Quinn. Petitioner Hoffa, as Partin testified, at first said no, but when Partin described Quinn, Petitioner Hoffa stated that Quinn was in Nashville to help him (R. 260). Partin immediately reported this to Sheridan and arranged with Sheridan to come to the hotel lobby on that day to look at Quinn and see who he was.

Sheridan told Partin that he wanted to be advised if Partin "heard any more along this line" of jury tampering (R. 371-372, 660-662).

The Test Fleet trial went on from October 22 into December. Partin was in Nashville on practically every day of the trial. Typically, Partin went to Baton Rouge on his own affairs when, as on weekends, the Test Fleet court was not in session, and returned to Nashville for each resumption of the trial. Thus, he made eleven plane trips to and from Nashville. Except on one occasion when he could not get a room there, Partin while in Nashville stayed at the Andrew Jackson Hotel (R. 283; 305-306; 318; 439; 440; 450-451; 478-479; 508-509; 515-516; 680; T. 4203).

Throughout the Test Fleet trial, Petitioner Hoffa and his counsel lived at the Andrew Jackson Hotel. Petitioner Hoffa occupied a suite which consisted of a hallway from the hotel corridor, a lounge, a bedroom for himself, and a bedroom for Mr. Bufalino, an attorney of record who was actively participating in the defense (R. 330-331, 349-350, 1402-1406). This suite was the defense headquarters. There his counsel conferred with Petitioner Hoffa as to his defense, interviewed witnesses, prepared for the examination and cross-examination of witnesses, discussed applicable questions of law, and, at the end of each court day, considered into the night the trial strategy for the next day (R. 1407-1409, 349-350). Partin "was constantly hanging around" in the suite (R. 262), where, virtually every day of the Test Fleet trial, he got people ash trays, moved chairs, and acted as doorman (R. 1409-1411, 405-406).

With Petitioner Hoffa's counsel in court on trial days, Partin was in court every day, too (R. 305). He

went to and from the courthouse with Petitioner Hoffa and/or his counsel (R. 315, 335-336), and ate with them (R. 284-285, 296-297, 315, 339, 357).

In sum, as six attorneys who had participated in the Test Fleet defense testified without contradiction in this proceeding: throughout the Test Fleet trial, Partin had access to the defense councils (R. 330-365; 404-414) and participated and associated with Petitioner Hoffa and his counsel when the trial was being discussed (R. 331, 333-337, 349-352, 356-358, 361-362).

For example, an attorney of record for Petitioner Hoffa interviewed a number of truck drivers the day before they were to testify for the defense. Partin was present during the interviews, which were stenographically transcribed and given to the witnesses for possible corrections. Partin helped assemble the transcribed questions and answers (R. 333-335). Sheridan admitted in the trial below that Partin had told him about the questions and answers, and that defense counsel had been going over them with the drivers (R. 388-389). Prosecutor Neal at the Test Fleet trial asked one of the drivers:

> Q. Did [defense counsel] give you anything to read, Mr. Sammut?
> A. No, sir, not even a newspaper.
> Q. Not even a newspaper? I am not talking about newspapers, I am talking with respect to your testimony. Did they give you anything to read with respect to your testimony?
> A. After I talked to them.
> Q. They gave you written questions and answers, didn't they?
> A. The questions that they asked me and the questions that I answered.
> (R. 416-417)

On another occasion in the Test Fleet trial, Government counsel objected to a question before the defense counsel could state it, other than referring to a date. When defense counsel asked: "Have you been listening to our conversations? How would you know what I am going to ask this witness?", the prosecutor replied: "I am psychic" (R. 415). Partin had been present when the questions to be asked of the witness had been discussed by defense counsel in Petitioner Hoffa's suite the night before (R. 334-336).

Partin discussed the selection of the Test Fleet jury with Petitioner Hoffa and heard counsel discuss it (R. 294, 345). He heard one of Petitioner Hoffa's counsel criticizing other defense counsel as to what they were doing wrong in the case, and what should be done in correction (R. 357, 316). He took defense exhibits to the printer (R. 336). He was present when the questions prepared for jury voir dire were distributed among counsel (R. 405). He interrogated one of defense counsel on an important aspect of defense trial strategy with respect to prospective testimony by the defendant, and separately interrogated each of two defense counsel on another important aspect of the defense (R. 409).

In Nashville, Partin reported to Sheridan on a daily basis (R. 372, 874). Neither Sheridan nor Grimsley ever defined to Partin "jury tampering", "other illegal activities", "other violations of the law", or "anything of interest." Partin never got a specific limitation on what kind of information was wanted by the Government. Sheridan relied on Partin's judgment. Partin, who had the equivalent of a tenth grade education (R. 572), did not attempt to judge what would be evidence of what he was told to look for.

Accordingly, he reported to Sheridan "anything that I would have seen." (R. 874, 773, 372, 373, 1488).

Sheridan admits that commingled with Partin's daily reports to him on evidence of jury tampering was information obtained by Partin on: (1) trial matters concerning the defense, including comments by Petitioner Hoffa's counsel and interviews of defense witnesses by Petitioner Hoffa's counsel; (2) the comings and goings of people to and from defense headquarters; (3) defense activities adjudged "unethical" by Sheridan, but not known to him to be illegal because "I am not an attorney"; and (4) other matters "related just generally to the trial" which he thought "very minimal" (R. 372, 373, 374, 378, 388-389). Sheridan passed the information on to the Government trial attorneys (R. 374-376, 388-389) and on a daily basis to the F.B.I. (R. 397).

Partin reported to Grimsley from time to time, especially when changing planes at Atlanta on his eleven trips to and from Nashville. These reports included discussion of the "major details" of the Test Fleet case and trial, as well as evidence of jury tampering allegedly obtained by Partin (R. 639-640, 1494-1502, 1505-1507).

The action of the trial court in sustaining Government objections to disclosure of the nature of the information transmitted by Partin thwarted the defense efforts to find out further details as to Test Fleet defense information passed to the Government (R. 286, 292-293, 294-295, 299-300).

Along with Test Fleet defense information, Partin reported to Sheridan and Grimsley on admissions pertaining to jury tampering, allegedly obtained by

Partin. The admissions, so far as they relate to the counts on which Petitioners were convicted, were claimed by Partin to have been obtained by him from Petitioners Hoffa or King on the dates and in the circumstances which follow.

Every day he was in Nashville, Partin spoke with Petitioner Hoffa, and also with Petitioner King (R. 673, 951). According to Partin, on October 22, the day of Partin's arrival in Nashville and the opening day of the Test Fleet trial: (1) Partin went to Petitioner Hoffa's suite in the Andrew Jackson Hotel and interrogated him to ascertain that the mysterious "Anthony Quinn" (later identified by Partin as Nicholas J. Tweel, co-defendant in this proceeding) was in Nashville to help Petitioner Hoffa (R. 259-260); (2) later, in Petitioner Hoffa's bedroom, Partin got a statement from Petitioner Hoffa of the intention on the part of an undisclosed "they" to "get to one juror or try to get to a few scattered jurors and take their chances" (R. 425-426, 434);* and (3) Partin, in some undisclosed place, heard from King that "they had a meeting set up on the jury that night" (R. 260).**

The next day, October 23, just before he left town on one of his trips to and from Nashville, Partin heard from Petitioner Hoffa that he might want Partin on his return to Nashville "to pass something for him." At the time of this alleged statement, Petitioner Hoffa, according to Partin, hit his rear pocket. This evidence Partin obtained in Petitioner Hoffa's suite (R. 434-

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* When testified to by Partin in this case, this alleged admission of the criminal intent of undisclosed persons necessarily prejudiced all Petitioners.

** Again an alleged admission calculated, in the setting of a trial for jury tampering, to prejudice all Petitioners.

437). On his return to Nashville in the late evening of October 25, Partin, because of lack of space at the Andrew Jackson Hotel, stayed at the James Robertson Hotel. Immediately upon checking in, Partin went directly to Petitioner Hoffa's suite in the Andrew Jackson Hotel. The purpose of this visit was, as Partin explicitly admitted, to remind Petitioner Hoffa of his possibly wanting Partin to pass something for him. When so prodded by Partin, Petitioner Hoffa allegedly said: "The dirty bastards went in and told the Judge that his neighbor had offered him $10,000. . . . We are going to have to lay low for a few days" (again an alleged admission inevitably prejudicial to all Petitioners at trial in this case because of the undisclosed "we"), (R. 438-439, 440-443).*

The next morning (October 26) Partin went to Petitioner Hoffa's suite and joined the people there who were getting ready to go to court for the Test Fleet trial. He engaged Petitioner King in a conversation that took place partly in the suite and partly in the hallway on the way to the elevator. On this occasion, as Partin testified here, Petitioner King told Partin in detail of what Petitioner King had learned about juror Paschal** and of Petitioner King's plans for influencing juror Paschal and any other juror if possible (R.

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* Other evidence in the case tended to connect the alleged admission with the attempt to influence juror Tippens as charged in Count II of the indictment. Petitioner Hoffa, the only Petitioner named as a defendant to that count, was acquitted. But Petitioner Hoffa's alleged admission to Partin remained in the case to the prejudice of all Petitioners, despite their motions to strike. See the Petition for Certiorari filed by Petitioner Hoffa in No. 32, pp. 32-33, 34-35.

** Petitioners King and Hoffa were convicted of endeavoring to influence juror Paschal as charged in Count V (R. 5-6).

443-444, 445-446, 447-450). October 26, being a Friday, Partin then went home to Baton Rouge for the week-end (R. 450).

Partin returned to Nashville on Monday, October 29, and in Petitioner Hoffa's suite elicited from him, as Partin testified, a statement of Petitioner Hoffa's willingness to pay $15,000 or $20,000 to get to the jury (R. 454-456). The next day, October 30, while at the courthouse in attendance on the Test Fleet trial, Partin allegedly heard from Petitioner King of steps already taken and steps about to be taken to influence juror Paschal (R. 457-458). Partin returned from his next trip out of Nashville on November 4, a Sunday (R. 462). On Monday morning, in the Andrew Jackson Hotel, Petitioner Hoffa, as Partin testified, was berating Petitioner King for just talking and doing nothing to influence juror Paschal (R. 463-464). But on the same day, Petitioner King allegedly told Partin of further steps already taken to influence juror Paschal and of a secret meeting between Petitioner King and juror Paschal's husband already arranged to take place in the woods at midnight on Sunday, November 11. Partin did not identify the place in which he claimed to have procured these admissions by Petitioner King (R. 464-465). On this particular trip to Nashville, Partin stayed until November 7 (R. 465). Before leaving for Dallas, Texas, on that day, Partin went to Petitioner Hoffa's suite, pushed the door part way closed, commented to Petitioner Hoffa on the poor outlook of the Test Fleet defense and got a reply. The substance of the reply in Partin's own words was (R. 466-467):

> He said, "well, don't worry about it too much . . . because I have got the colored male juror in

> my hip pocket . . . . One of my business agents Campbell came into Nashville prior to the trial and took care of it." He told me that Campbell was kin to the juror . . . . [He] said it looks like our best bet is a hung jury unless we can get to the foreman of the jury. He said, "If they have a hung jury, it will be the same as acquittal because they will never try the case again."

Petitioner Campbell and his uncle, Petitioner Parks, both Negroes, were convicted together with Petitioner Hoffa on the Count III charge of endeavoring to influence juror Fields, a Negro (R. 4-5).

Thereafter to the end of the Test Fleet trial, Partin, according to his testimony, continued to obtain admissions as follows: In a conversation in the Andrew Jackson Hotel lobby on November 7, Petitioner King told Partin of Petitioner Hoffa's complaining to him about his not "getting to the jury" as he had said he would; and Petitioner King admitted being delayed on an approach to juror Paschal (R. 467-468, 469). On November 14, Partin was particularly active. In Petitioner Hoffa's suite, he overheard Petitioner Hoffa saying that he wanted some insurance, and berating Petitioner King for "not making a contact" as he had said he would (R. 472-473). Later, in the same suite, after going to court, Partin learned from Petitioner King of his having already arranged a meeting with a friend of juror Paschal's husband, together with a "cover" story if anyone became suspicious (R. 475-476). Still later on the same day in the "hall of the hotel," Partin overheard Petitioner Hoffa complaining to Petitioner King of his "thumbing around and not getting the job done" (R. 476). On the next day, November 15, Partin drew further admissions from Petitioner King in regard to reaching juror Paschal

(place of conversation not stated); and in Petitioner Hoffa's suite, heard Petitioner Hoffa asking Petitioner King "how things were looking . . . and had he made the contacts," and being told the contacts were unnecessary "because things looked pretty good" (R. 477-478). On November 20, "in the lobby," Partin heard from Petitioner King of his having met with juror Paschal's husband to get him to speak to his wife, and in Petitioner Hoffa's suite, heard from Petitioner Hoffa of his disappointment with that meeting (R. 480-483). Finally, in the period December 3-7, Partin, in the lobby of the courthouse, spoke to Petitioner King about "how the jury was going" and was told that "Hoffa was wanting to get insurance" (R. 516-517); and in the hotel lobby, Partin listened to Petitioner King's complaint "about Mr. Hoffa being on him about not getting everything lined up like he was supposed to . . ." (R. 517-518). This last admission concerning Petitioner King's complaint was excluded with instruction to the jury to disregard (R. 518). All of the other alleged admissions went to the jury, together with the denials of Petitioners Hoffa and King that any of them ever happened.

According to Partin, Test Fleet defense counsel were "close" to Partin when he obtained some of the foregoing alleged admissions, but not "in on the conversation" (R. 271).

Partin did not keep notes on the dates, times and places of the alleged admissions because Sheridan did not instruct him to do so (R. 701, 765-766).

At the outset of the Test Fleet trial, Sheridan instructed Partin on how they would meet (R. 663-665), and Sheridan, Grimsley and Partin agreed on the assignment of the code name "Anderson" or "Andy"

to Partin for the purpose of hiding his identity. Partin thereafter used the code name in his reporting to Sheridan and Grimsley (R. 1492, 1558, 1559). On occasion, in communications between Partin and Sheridan, Sheridan was designated as "John Black" (R. 1565, 1566). Partin telephoned Sheridan "step by step" as he elicited an admission (R. 701, 821). Detailed reports were made by Partin to Sheridan at meetings between them, usually in Sheridan's car, sometimes in Sheridan's Nashville apartment, but with entry through the back door (R. 910), and once in a theatre lobby (R. 657, 658, 733, 906, 908-911). Sheridan picked up and delivered Partin on the street away from the defense headquarters in the Andrew Jackson Hotel (R. 906, 908). Partin never advised anyone connected with the Test Fleet defense that he was working for the Federal Government and transmitting information to it. He "hid" his governmental work from them "because if they wasn't violating the law they shouldn't care" and "I certainly wouldn't have been silly enough to go tell them" (R. 280, 297, 815-816). Petitioners first learned of his undisclosed work in carrying defense information and admissions to the Government when he took the stand near the close of the trial below.

Sheridan, admittedly, was "naturally interested in keeping him [Partin] in Nashville" and is "sure" that Partin's furnishing of information to the Department of Justice had some bearing on Partin's being in Nashville (R. 379).

At about the time of Partin's governmental work on Test Fleet defense preparation and trial strategy, and on, as he claims, evidence of jury tampering, Partin was informing to Grimsley concerning a Federal government official not connected with Petitioners,

and discussing matters unrelated to this case with Sheridan and Grimsley (R. 1502-1503, 1193-1194; T. 4245).*

Partin was not at the Test Fleet trial and defense for the purpose of participating, and did not participate, in the criminal conduct to which he testified (R. 1013-1014; T. 4726).

Upon receiving a subpoena to appear before the Grand Jury in this very case, after conclusion of the Test Fleet case, Partin, on the pretext of seeking legal advice sought out Petitioner Hoffa's counsel and allegedly obtained an admission that the defense was telling all witnesses to invoke the Fifth Amendment privilege. Partin relayed this information to Sheridan (R. 974-986, 991-992; T. 4546, 4695).

(c) The Government's Payments to Partin

Partin and Sheridan denied the paying or promising of anything to Partin (R. 321, 383). But Partin has not had to undergo trial on any of the State and Federal criminal charges pending against him in the Fall of 1962 when he started to work as informer for the Federal Government. The Federal embezzlement charge (Grimsley assigned as prosecutor) was adjourned without date (R. 1310, 1302, 1312-1313, 1441-1444); Pitcher dismissed the State perjury and kidnapping charges (R. 1340, 1342-1343); the State manslaughter charge

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* In a matter now pending before this Court there are affidavits from Edward Partin and Walter Sheridan, among others, which demonstrate the Government's continued interest and assistance to Partin in unrelated matters after the conclusion of the instant case. *Edward G. Partin, Petitioner* v. *National Labor Relations Board,* October Term, 1966, No. 268, Brief for the National Labor Relations Board in Opposition.

has not been prosecuted (R. 634-636); and the local Internal Revenue Service agents received orders to refrain from pressing a Federal tax claim against Partin (R. 1256).

So far as cash is concerned, Partin claimed (R. 534-535) and then denied (R. 875) that payments secretly made by the Department of Justice to his wife covered his expenses on trips he took to consult with Department of Justice representatives in preparation for this proceeding. At least as to some of these trips, Grimsley denied that they had anything to do with this case (R. 1203).

However, at the time of the secret payments, Partin was under court order to pay his wife $300 a month for the support of his children (R. 996), and he was apprehensive because he did not want his wife to have him up in court for non-support (R. 1002). Sheridan had asked him if he had any outstanding debts that he had to take care of if he had to be gone for a while (R. 993). The obligation to his wife was the only outstanding debt he had (R. 877). Partin had also told Grimsley that he had this outstanding obligation and that he was worried whether it would be taken care of or not (R. 1006-1007). Sheridan was also informed of how much Partin had to pay each month (R. 923). It was Partin's understanding that the support payments to his family were taken care of as a result of his conversations with Grimsley and Sheridan (R. 923). The Court at first sustained the Government's objection to a defense request to produce the Department of Justice memorandum authorizing the payments of funds to Partin's wife (R. 1058).

Grimsley identified himself as the payee of checks totalling $1,200 drawn on the Treasury of the United

States. Grimsley cashed each check, bought a cashier's check in equivalent amount, and mailed it to Mrs. Partin. There was no name of the remitter on the cashier's check. He just wrapped paper around it to keep the check from showing through the envelope when he mailed it. Sheridan had told Grimsley that he was "to send the money to the lady" (R. 1194-1197). These checks to Mrs. Partin were sent from July, 1963, to November, 1963 (R. 1212).

This was the only time that Grimsley had occasion to pay third parties by receiving Treasury checks, cashing them, and purchasing cashier's checks to pay the third party (R. 1210).

Over the objection of the Government, the Court finally directed it to produce the Department of Justice memorandum dealing with the payments to Partin (R. 1226-1228). The memorandum is dated July 3, 1963 and is to one Andretta (S. A. Andretta was Assistant Attorney General in charge of Administration) from Sheridan, showing that these funds came from a confidential fund, and authorizing a flat payment of $300 a month to Grimsley (Exhibit 154, R. 1629), the exact amount of alimony that Partin was required to pay his wife. Grimsley, who had at first misrepresented these payments as being for Partin's travel expenses (R. 1213), finally admitted that they were for the support of Partin's children and not for Partin's expenses (R. 1219, 1233). The Department of Justice memorandum authorizing these payments stated them to be "in connection with the forthcoming trials in Nashville, Tennessee," i.e., this very case which was subsequently transferred to Chattanooga (Exhibit 154, R. 1629).

(d) Proceedings Below

The trial court denied Petitioners' motions to suppress Partin's testimony for violation of their constitutional rights by the Government-Partin operation (R. 419-420; 35a, 41a, 42a, 44a, 45a, 46a, 47a, 51a, 52a, 55a),* as well as motions by individual Petitioners for a severance or a mistrial (R. 425-427, 437-438). Partin's testimony of admissions by Petitioners Hoffa and King went to the jury under repeated instructions, objected to by Petitioners, that permitted the consideration of such admissions against all Petitioners (R. 424-425, 468-471, 494, 514; T. 1529-1541, 1581-1589, 1801-1802).

The Court of Appeals affirmed the convictions so obtained. It saw no invasion of Petitioners' constitutional rights in the methods used by the Government and Partin in obtaining the incriminating admissions to which he testified. This Court granted certiorari to determine whether those methods did invade Petitioners' rights under the Fourth, Fifth and Sixth Amendments.

SUMMARY OF ARGUMENT

I. *Fourth Amendment*—Government agent Partin repeatedly entered Petitioner Hoffa's residential suite to obtain some of the admissions he claims were made. None of those admissions could be validly used by the Government because they were the immediate objective and direct product of many-sided violations of the Fourth Amendment, namely, exploratory searches for evidence repeatedly conducted in a man's home without any warrant. In fact, no magistrate could law-

* These page references followed by "a" are to Volume I of the Joint Appendix printed for the Court of Appeals, which Joint Appendix is on file with the Clerk of this Court.

fully have granted any such warrant. Partin's deception in carrying on his role of Government informer under cover of being a union colleague and defense helper was the equivalent of forcible entry and prevented any effective consent to his unreasonable searches of Petitioner Hoffa's suite. The Fourth Amendment prohibits Government use of any product of an unreasonable search, whether it be verbal admissions, or written admissions, or concrete objects. *Gouled* v. *United States,* 255 U.S. 298, and other authorities cited. *Gouled,* on its facts alone, requires ruling in favor of the Petitioners, unless distinction is to be made between a physical and a verbal product of a Fourth Amendment violation. That distinction makes no sense, and it has been flatly rejected by the Court. See *Wong Sun* v. *United States,* 371 U.S. 471, 485-486.

II. *Sixth Amendment in relation to Petitioner Hoffa's right to counsel in defending against the Test Fleet charge.*—Government agent Partin inevitably had to invade, and under the Government's instructions did invade, *Test Fleet* defense preparations and consultations to carry out the Government's objective of getting evidence of jury tampering. Indisputably, the Government through Partin ignored and violated the Sixth Amendment during the very trial of a criminal case. As in the case of the Fourth Amendment, and for like reasons, judicial use of the product of the Government's Sixth Amendment violation, i.e. Partin's testimony, is condemned by the Constitution. Like the Fourth Amendment, the Sixth Amendment is a fundamental guarantee of the Bill of Rights.

III. *Sixth Amendment in relation to the rights of Petitioners Hoffa and King to counsel in this proceed-*

ing.—Fortified by the admissions allegedly made to Partin, the Government by October 25 had adequate evidence to arrest Petitioners Hoffa and King on charges of jury tampering. On arrest and charge, Sixth Amendment rights to counsel would have been applicable. *Escobedo* v. *Illinois,* 378 U.S. 478; *Massiah* v. *United States,* 377 U.S. 201; and other authorities cited. The Government could not lawfully eliminate those rights by postponing arrest and charge. In appropriate circumstances, the absence of arrest and charge is no bar to Sixth Amendment rights. *Reece* v. *Georgia,* 350 U.S. 85. The facts here are appropriate for application of the Sixth Amendment. Partin's pretrial discovery while in the secret role of Government informer nullified Petitioners' rights to counsel at trial. Instead of the partial deceptions made possible by in-custody questioning (compare *Miranda* v. *Arizona,* 384 U.S. 436), the Government here obstructed the exercise of Sixth Amendment rights by the one big deception of a secret Government agent as defense helper. Most importantly, the Government was not, after October 25, engaged in any general investigation of an unsolved crime. Trial use of the admissions allegedly obtained after that date was surely barred by the Sixth Amendment.

IV. *Fifth Amendment — self-incrimination.*—The Point III argument for the Sixth Amendment's barring of the admissions allegedly obtained after October 25, applies with even more force to the barring of those admissions by the Fifth Amendment's provision against self-incrimination. The Sixth Amendment right to counsel begins at some point; but the privilege against self-incrimination is always with a man, regardless of his being charged or in custody. The cases cited support the barring of all of the alleged admissions.

V. *Fifth Amendment — due process.* — Petitioners' convictions offend due process because of the *total combination* of the following facts: (1) The Government use of a secret informer during the trial of a criminal case; plus (2) the particularly high risk of perjury in the testimony of Partin, the particular informer used by the Government here (cf. *Mesarosh* v. *United States,* 352 U.S. 1); plus (3) the Government's use of the informer here invaded the privacy of a man's home, infiltrated the councils of a man on trial for a criminal charge, and did deprive him of the opportunity to utilize his counsel and remain silent—all in one process of ignoble deception, directed not to investigation, but the securing of conviction; and plus (4) the Government's postponement of arrest and charge until after the time the Government had probable cause, so that Partin's getting further alleged admissions from Petitioners Hoffa and King without opportunity to them for the exercise of Fifth and Sixth Amendment rights, made sure that their "fair trial" would be a mere formality.

ARGUMENT

Here the Government's role was the active one of obtaining and directing the work of Partin as its constant and secret informer. This is not a case in which the Government passively accepted volunteer offerings by Partin of Test Fleet defense information and admissions of jury tampering.*

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* Even if this were such a case, reversal of Petitioners' convictions might nevertheless be required. See *Massiah* v. *United States,* 337 U.S. 201, 206-207; *Lustig* v. *United States,* 338 U.S. 74, 78; *United States* v. *Guerrina,* 112 F. Supp. 126, 129 (E.D. Pa.); *Local 309* v. *Gates,* 75 F. Supp. 620 (N.D. Ind.); cf. *Abel* v. *United States,* 362 U.S. 217, 241, 246 (Justice Douglas dissenting, with Justice Black).

Partin started that work on October 2, 1962, weeks before his first arrival in Nashville on October 22, the opening day of the Test Fleet trial (R. 1201). Before Partin left for Nashville on the first of his eleven plane trips there, Department of Justice official Grimsley instructed him on his duties in Nashville, namely, "to keep his eyes and ears open" and report to Department of Justice official Sheridan on "any attempts at witness intimidation or tampering with the jury" and "if he heard anything of interest" (R. 1488, 1132). On his first arrival in Nashville, Partin already understood from Grimsley's instructions that he was "to discover . . . evidence" of "a violation of the law or jury tampering" or "something like that" (R. 790). With that understanding, Partin "knew what I was looking for" in Nashville (R. 945).

On Partin's first arrival in Nashville, he was instructed in detail by Sheridan on how to report to him (R. 664-665), and the code name of "Anderson" or "Andy" was assigned to Partin for the purpose of hiding his identity. Pursuant to those instructions, he reported to Sheridan and Grimsley under the name of "Anderson" (R. 1492, 1558), and was picked up and delivered by Sheridan on the street out of sight of the Andrew Jackson Hotel which housed Partin, Petitioner Hoffa and the Test Fleet defense headquarters (R. 787-788, 908). In Nashville, Sheridan received Partin's daily reports on his work as the Government's informer (R. 874, 372), while Grimsley in Atlanta frequently received such reports directly from Partin (R. 639, 1495-1506). In his work for the Government as its secret informer, Partin did no more and no less than he was told to do by the Government (R. 700-701, 766). The Government was "naturally interested"

in Partin's services on its behalf—services which by Sheridan's own admission had "some bearing" on Partin's taking of eleven plane trips (usually Baton Rouge-Nashville and return) to be in Nashville during the Test Fleet trial (R. 379).

Certainly, on those facts, the Government got Partin to work for it as Government informer and bossed his every effort in that informing work.* And certainly, too, the Government, as befits the master, paid Partin, its servant, for the work. In the early fall of 1962 when Partin started to work for the Government, he faced trial on five serious criminal charges—kidnapping, embezzlement, manslaughter, perjury and assault. See p. 5, *supra*. As of today, with two of the charges dismissed, he has been tried on none of them. See p. 20, *supra*. Such lack of zeal in enforcement of Federal and state criminal laws might conceivably have been fortuitous. However, the Government by arrangement with Partin did pay him money circuitously by way of hidden remittances of three hundred dollars a month to Partin's wife in taking care of Partin's obligation to her and his children. See pp. 21-22, *supra*. These payments were unquestionably made "in connection with" this proceeding (Exhibit 154, R. 1629). Grimsley, who made these payments for the Department of Justice at Sheridan's direction, admitted that they were not made in reimbursement for Partin's expenses as a witness in this proceeding (R. 1219). Hence, the payments were made in compensation for Partin's services as an in-

* This is not to say that Partin, in rescuing himself from imprisonment, was not more than willing to do whatever the Government told him to do. (R. 1617-1628; and see pp. 4 and 8, *supra*.)

former for the Government.* These Government payments in compensation to Partin for his work as Government informer merely emphasize, as the other facts show, that he was the Government's agent or servant for whose actions the Government is responsible. Since he was indubitably directed by the Government in the performance of his work as Government informer, it matters little on the constitutional issues here presented whether or not he was paid for his work in cash or by the abandonment or withholding of action on the criminal charges against him. See the discussion in *Sherman* v. *United States,* 356 U.S. 369, at 373-374; and the opinions in *Massiah* v. *United States,* 377 U.S. 201, and *Gouled* v. *United States,* 255 U.S. 298, where no point is made as to whether the Government informer involved was paid or not.

In the foregoing context of a secret informer working under the direction of the Government, and on the record here, we rely on the Constitution for five arguments with respect to the question granted review by the Court. First, we urge that the admissions testified to by Partin were obtained in repeated violations of Petitioner Hoffa's right under the Fourth Amendment to be free of unreasonable search of his living quarters. Second and third, and under the Sixth Amendment, we submit that such alleged admissions were inadmissible in the trial below because they were obtained (a) by

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* Since the Department of Justice is not a federal relief agency engaged generally in the succoring of deserving wives and children, the only other possible reason for the Department's payments to Partin's wife would present a grave question of violation by the Department's officials of 18 U.S.C. Sec. 201(d), (h). That section, under sanction of prison term and fine, would prohibit payments or promises of payments directly or indirectly to Partin, if made to influence testimony in the trial below, or "for or because of" such testimony.

the Government's unconstitutional invasion of the Test Fleet defense, and (b) by the Government's depriving the Petitioners of their right to counsel in the present case. Fourth and fifth, we argue that the Government got the alleged admissions in violation of Fifth Amendment rights (a) against self-incrimination and (b) of due process.

Before *seriatim* discussion of our five grounds for reversal, we make two comments going to the whole case on any or all grounds. If the alleged admissions (or any one or more of them) by Petitioners King or Hoffa were, as we say, inadmissible against such Petitioner because of violation of his constitutional rights, the convictions of all Petitioners must be reversed. Prejudice need not be shown for any Petitioner whose constitutional rights were violated. *Glasser* v. *United States,* 315 U.S. 60, 75-76; *Hamilton* v. *Alabama,* 368 U.S. 52; *Krulewitch* v. *United States,* 336 U.S. 440, 445. In the circumstances of this case, reversal of the convictions of Petitioner King or Petitioner Hoffa because of violation of his constitutional rights means reversal for all Petitioners. The motions for severance by each of the four Petitioners were denied (R. 425-427, 437-438); and the Government's case went to the jury as "an organic tissue of proof" (*Anderson* v. *United States,* 318 U.S. 350, 357) under repeated instructions permitting jury consideration against all Petitioners of Partin's claimed admissions (see p. 23, *supra*). Each of Partin's claimed admissions "gave flesh and blood reality" (*Mesarosh* v. *United States,* 352 U.S. 1, 10) to the charges against all Petitioners. All are entitled to reversal if any such admissions could not for constitutional reasons be used as evidence. *Mesarosh* v. *United States,* 352 U.S. 1, 10 ff;

McDonald v. *United States,* 335 U.S. 451, 456; *Anderson* v. *United States,* 318 U.S. 350, 357; *Goldstein* v. *United States,* 316 U.S. 114, 119-120; cf. *Malinski* v. *New York,* 324 U.S. 401.

Finally, in delineation of what this case is, we note the fact that none of the convictions under review concerns admissions made to a Government agent who, as to the offense charged, acted as a participant in the offense charged by purchasing contraband, or receiving a bribe, or the like.* Whatever may be the Court's final answer to that type of question,** no such question is presented here. Partin was not a participant in the offenses on which Petitioners were convicted (R. 1013-1014). Partin was not a juror in the Test Fleet case. All of the alleged admissions concerned the efforts at jury tampering made by others out of his presence. Reversal here would not affect the Government's use of informers who buy narcotics or other contraband or receive offers of bribes; for in such cases there are different considerations of individual privacy as against the needs of society, and a different constitutional line may be drawn. Neither would reversal here affect the Government's traditional uses of informers so far as their uses comply with the paramount requirements of the Constitution.

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* Compare *Lopez* v. *United States,* 373 U.S. 427 (bribe to a known Internal Revenue Service agent); *Lewis* v. *United States,* 352 F. 2d 799 (C.A. 1), cert. granted, 382 U.S. 1024 (narcotics sale to undercover Government agent); *Vinyard* v. *United States,* 335 F. 2d 176 (C.A. 8), cert. den., 379 U.S. 930 (bribe to a known Internal Revenue Service agent); *United States* v. *Denton,* 307 F. 2d 336 (C.A. 6), cert. den., 371 U.S. 923 (liquor sale to undercover Government agent); *United States* v. *Pasquinzo,* 334 F. 2d 74 (C.A. 6) (narcotics sale to undercover Goverment agent).

** Three Justices dissented in *Lopez,* and the Court has granted certiorari in *Lewis,* No. 811, Oct. Term, 1965.

I.

THE INCRIMINATING STATEMENTS ALLEGEDLY OBTAINED BY PARTIN IN PETITIONER HOFFA'S SUITE WERE INADMISSIBLE BECAUSE PARTIN ELICITED THEM IN VIOLATION OF PETITIONER HOFFA'S RIGHT UNDER THE FOURTH AMENDMENT TO BE FREE OF UNREASONABLE SEARCH AND SEIZURE

Partin in Nashville was under the Government's instructions (R. 271, 280, 1212) to discover evidence of jury tampering or other violation, and was "looking for" such evidence (R. 945). A substantial part of his repeated searches for such evidence (after each of eleven plane trips to Nashville) was carried on in the suite occupied by Petitioner Hoffa as his home for the duration of the Test Fleet trial. It was in Petitioner Hoffa's suite that Partin allegedly elicited incriminating admissions from him on October 22, the day of Partin's first arrival in Nashville (see p. 14 *supra*), and thereafter on October 23, 25 and 29 (see pp. 14, 15 and 16 *supra*) and on November 7 (see pp. 16-17, *supra*). Still later, on November 14, Partin, according to his testimony, overheard an incriminating statement by Petitioner Hoffa to Petitioner King (see p. 17, *supra*).

But Petitioner Hoffa in occupying his hotel suite as his home was protected by the Fourth Amendment against unreasonable searches by the Government. *Stoner* v. *California,* 376 U.S. 483; *United States* v. *Jeffers,* 342 U.S. 48; *McDonald* v. *United States,* 335 U.S. 451; *Johnson* v. *United States,* 333 U.S. 10. "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Silverman v. *United States*, 365 U.S. 505, 511 (opinion of Justice Stewart, for the Court.)*

(a) Partin's Searches of Petitioner Hoffa's Suite Were Unreasonable

Partin's numerous intrusions into Petitioner Hoffa's suite on behalf of the Government repeatedly violated practically every restriction imposed upon the Government by the Fourth Amendment. The Fourth Amendment forbids to the Government general and exploratory searches in a protected area. Partin, at the bidding of the Government, was looking for nothing more specific than evidence of witness intimidation, or jury tampering, or other illegal activity. This went far beyond the general searches heretofore condemned by this Court.** The Fourth Amendment forbids to the

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* Perhaps the most poignant statement of the necessity for this right in 20th-century living was made by Judge Jerome Frank, dissenting in *United States* v. *On Lee*, 193 F. 2d 306, 315-316 (C.A. 2). As quoted with approval by this Court in *Silverman, supra*, at p. 511, n. 4, Judge Frank's statement reads:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

** Compare the facts of *Hale* v. *Henkel*, 201 U.S. 43, 76-77 (search by subpoena for defendant corporation's papers so far as they concerned twelve named corporations); *Go-Bart Importing Company* v. *United States*, 282 U.S. 344 (search for evidence of a liquor conspiracy); *United States* v. *Lefkowitz*, 285 U.S. 452 (search for evidence of a liquor conspiracy); *Kremen* v. *United States*, 353 U.S. 346 (search for evidence of harboring a fugitive from justice); and *Stanford* v. *Texas*, 379 U.S. 476 (search for papers concerning the Communist Party of Texas and its operations). We recognize that First Amendment considerations strongly influenced the decision in *Stanford*. Here, Partin's general searches violated the Sixth Amendment as well as the Fourth. See Point II, *infra*.

Government searches in a protected area for evidence of crime as distinguished from contraband or the instrumentalities of crime.* Evidence of crime is precisely what Partin was told to get and, as he claims, did get for the Government. Except in special circumstances plainly not present here, the Fourth Amendment forbids to the Government searches of a dwelling without a warrant.** Justice Stewart, writing for the Court, recently summarized this prohibition in *Stoner* v. *California,* 376 U.S. 483, 486:

> The search of the petitioner's room by the police officers was conducted without a warrant of any kind, and it therefore "can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant." *Jones* v. *United States,* 357 U.S. 493, 499.

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* *Boyd* v. *United States,* 116 U.S. 616, 623, 629; *Gouled* v. *United States,* 255 U.S. 298, 309; *United States* v. *Lefkowitz,* 285 U.S. 452, 464-465; *Taylor* v. *United States,* 286 U.S. 1. Pursuant to these decisions, the Fourth Amendment's prohibition of governmental searches for evidence is thoroughly imbedded in the administration of criminal justice by the lower Federal courts. *Williams* v. *United States,* 263 F. 2d 487, 488 (C.A. D.C.), cert. den., 365 U.S. 836; *United States* v. *Kirschenblatt,* 16 F. 2d 202, 203 (C.A. 2); *Takahashi* v. *United States,* 143 F. 2d 118, 123 (C.A. 9); *In re Ginsburg,* 147 F. 2d 749, 751 (C.A. 2); *Morrison* v. *United States,* 262 F. 2d 449, 450-451 (C.A. D.C.); see *United States* v. *Lindenfeld,* 142 F. 2d 829, 832, (C.A. 2) cert. den., 323 U.S. 761.

** *Amos* v. *United States,* 255 U.S. 313, 315-316; *Agnello* v. *United States,* 269 U.S. 20, 32 (Justice Butler holds for a unanimous Court: "The search of a private dwelling without a warrant is in itself unreasonable . . ."); *Go-Bart Importing Company* v. *United States,* 282 U.S. 344; *Johnson* v. *United States,* 333 U.S. 10; *McDonald* v. *United States,* 335 U.S. 451; *United States* v. *Jeffers,* 342 U.S. 48; *Jones* v. *United States,* 357 U.S. 493; *Chapman* v. *United States,* 365 U.S. 610; *Stoner* v. *California,* 376 U.S. 483.

Partin had no warrant. That prerequisite to a constitutional search was dispensed with as Sheridan, a nonlawyer prosecutor, arrogated to himself the judicial functions of a magistrate under the Fourth Amendment.* Cf. *Giordenello* v. *United States,* 357 U.S. 480.

(b) There Was No Consent to Partin's Unreasonable Searches, Since They Were Achieved Through Deception

At no point was there any consent by Petitioner Hoffa resulting in waiver of his Fourth Amendment right against Partin's unreasonable searching of his dwelling place in behalf of the Government. The Government and Partin successfully hid his purpose to act as Government informer, as well as all of his work as Government informer, both under Partin's initial role of a union colleague seeking personal advice, and under his later role of a helpful general factotum in the making of Petitioner Hoffa's Test Fleet defense. See particularly pp. 7-8 and 10, *supra.* Waiver of constitutional rights must be "intelligently and understandingly" made. *Carnley* v. *Cochran,* 369 U.S. 506, 513; *Moore* v. *Michigan,* 355 U.S. 155; *Johnson* v. *United States,* 335 U.S. 10, 13; *Johnson* v. *Zerbst,* 304 U.S. 458; *Kovach* v. *United States,* 53 F. 2d 639 (C.A. 6). The Government's deception in hiding the informer under his roles of the union colleague and defense helper prevented any intelligent and understand-

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* For the reasons stated in the text, the Government could not have obtained a warrant to make a general search in Petitioner Hoffa's suite for evidence of crime. Of course, the Government is not better off on the constitutional question here because it had no warrant. See *United States* v. *Di Re,* 332 U.S. 581, 587; *Weeks* v. *United States,* 232 U.S. 383, 393-394; *Morrison* v. *United States,* 262 F. 2d 449, 451 (C.A. D.C.); *Wakkuri* v. *United States,* 67 F. 2d 844, 845 (C.A. 6).

ing waiver of Petitioner Hoffa's Fourth Amendment rights. Because of the Government's deception, he could not know that such rights were even involved in Partin's repeated visits to his room.

In those circumstances, the deception practiced by the Government substitutes for the violence of forcible entry. Today the Fourth Amendment goes far beyond the original and ancient case of the King's men breaking in the door of the villager's cottage. It prohibits use of the alleged admissions obtained in Petitioner Hoffa's then home by repeated entries of Partin achieved through Government deception. The Fourth Amendment must do so for, otherwise, its basic guaranty of privacy, at least in the home, would be reduced to a largely meaningless formula as resourceful prosecutors, Federal and State alike, abandon force and rely on deception. Doubtless for that reason, the pertinent authorities on Government deception call for reversal here. *Gouled* v. *United States,* 255 U.S. 298, 302-306 (evidentiary papers obtained by entry of Government agent into business office under cover of business and social acquaintance excluded, and such deception held no different from force for purposes of the Fourth Amendment); *Go-Bart Importing Company* v. *United States,* 282 U.S. 344, 358 (product of general search of a business office made by Government agents upon an entry secured by deceptive claim of a nonexistent warrant, *held* inadmissible); *Fraternal Order of Eagles, No. 778* v. *United States,* 57 F. 2d 93 (C.A. 3) (observations made by Government agents in quarters of fraternal lodge held barred by the Fourth Amendment as product of entry gained by Government agents' deceptive claim of being fellow lodge members); *United States* v. *Mitchneck,* 2 F. Supp.

225 (M.D. Pa.) (observations made by Government agents in private home where liquor sold held barred by Fourth Amendment as product of entry gained by Government agents' deceptive claim of mutual social acquaintance); *United States* v. *Guerrina,* 112 F. Supp. 126 (E.D. Pa.), and *United States* v. *Lipshitz,* 132 F. Supp. 519 (E.D. N.Y.) (product of search of the taxpayer's records by Internal Revenue Service agents for purpose of criminal prosecution under deception of civil investigation held barred by Fourth Amendment); *United States* v. *Reckis,* 119 F. Supp. 687 (D.C. Mass.) (admission obtained by Government agent barred by Fourth Amendment as product of entry into farmhouse by deceptive claim of being a repairman.)*

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* See *Zap* v. *United States,* 328 U.S. 624, 629 (the Court carefully notes that the Government agents there involved "did not obtain access by force, fraud, or trickery"); *Davis* v. *United States,* 328 U.S. 582, 596 (Justice Frankfurter dissenting on facts remote from those here states that a Fourth Amendment violation may be by force or "fraudulently."); *Breithaupt* v. *Abram,* 352 U.S. 432, 443 (Justice Douglas, dissenting with Justice Black in the Fourth Amendment context of police use of a blood sample drawn from an unconscious defendant, refuses to "draw a line between the use of force on the one hand and trickery, subterfuge, or any police technique which takes advantage of the inability of the prisoner to resist on the other."); *Ker* v. *California,* 374 U.S. 23, 53 (in a case of search held lawful as incidental to a lawful arrest, Justice Brennan, dissenting with Chief Justice Warren and Justices Douglas and Goldberg, quotes with approval from *Gouled:* "A search would violate the Fourth Amendment if the entry were illegal whether accomplished 'by force . . .' or 'obtained by stealth instead of by force or coercion'."); *Gatewood* v. *United States,* 209 F. 2d 789, 791n (C.A. D.C.) ("Entry by stealth can, of course, be as unlawful as entry by the illegal use of force. *Gouled* v. *United States,* 255 U.S. 298."); *Williams* v. *United States,* 263 F. 2d 487, 491 (C.A. D.C.) (relying on *Gouled,* Judge Danaher, concurring, states flatly: "The police may not invade a private home by stealth."); *United States* v. *General Pharmacal Company,*

In *Gouled* and *Go-Bart, supra,* under the guise of business and social acquaintance (*Gouled*) or having a warrant (*Go-Bart*), the Government invaded a man's office for one general search without a warrant. Here the Government invaded a man's home for repeated general searches without a warrant. The citizen in *Go-Bart* knew he was dealing with Government agents and might have demanded the search warrant claimed. Petitioner Hoffa had no such opportunity, for Government agent Partin went about in the disguise of union colleague and defense helper. Partin's disguise of defense helper, unlike the deception practiced in *Gouled* and *Go-Bart,* necessarily trampled upon Petitioner Hoffa's right to counsel in his Test Fleet defense. See pp. 10-13, *supra;* and Point II, *infra.* Reversal here follows from the Court's decisions in *Gouled* and *Go-Bart.*

(c) The Admissions Claimed by Partin Were Barred by the Fourth Amendment as the Product of His Unreasonable Searches

Partin, without a warrant, looked in Petitioner Hoffa's dwelling place for any evidence of jury tampering or other crime. The evidence he found consisted

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205 F. Supp. 692, 694 (D.C. N.J.) (relying in part on *Gouled,* the Court states: "The cases . . . hold that where entry into a defendant's premises is procured by fraud and misrepresentation, such entry is not by consent, and whatever is obtained as a result of such an illegal search and seizure is inadmissible as evidence in a federal criminal trial."); cf. *Spano* v. *New York,* 360 U.S. 315, 323 (*held:* Confession obtained by "sympathy falsely aroused" is barred by Fourteenth Amendment); *Malloy* v. *Hogan,* 378 U.S. 1, 8 (*Spano* relied on for the proposition that a confession cannot be validly obtained by "sympathy falsely aroused."); *Lisenba* v. *California,* 314 U.S. 219, 237 (the Court states: "If, by fraud, collusion, trickery or subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law.").

of the incriminating admissions by Petitioners Hoffa and King which he claims to have heard or overheard. That evidence—the immediate product and indeed the very objective of Partin's unconstitutional searching—was inadmissible against Petitioner Hoffa. The Fourth Amendment prohibits the use against a man of statements claimed to have been made by him in the course of an invalid search by the Government. This is well-settled, for in this particular constitutional context there is no reason to favor the admissibility of verbal evidence over documentary or concrete evidence. *Wong Sun* v. *United States,* 371 U.S. 471, 485-486; *Silverman* v. *United States,* 365 U.S. 505; *Gatlin* v. *United States,* 326 F. 2d 666, 672 (C.A. D.C.) (*Held:* "Verbal evidence obtained from unlawful police action 'is no less the fruit of official illegality than the more common tangible fruits of the unwarranted police intrusion.' *Wong Sun,* 371 U.S. at 485."); *Bynum* v. *United States,* 262 F. 2d 465 (C.A. D.C.); *Nueslein* v. *District of Columbia,* 115 F. 2d 690 (C.A. D.C.); *United States* v. *Setaro,* 37 F. 2d 134 (D.C. Conn.); *In re Oryell,* 28 F. 2d 639, 640 (W.D. N.Y.).*

We recognize that in *Olmstead* v. *United States,* 277 U.S. 438, 463-464, where there was no physical entry by deception or otherwise, a five to four majority confined *Gouled* to its facts of an actual entry resulting in the seizure of papers. The majority opinion has *dicta* susceptible of the meaning that the Fourth Amendment affords no protection against "hearing or sight," because a Fourth Amendment search is for

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* Partin's otherwise invalid searching was not made constitutional by what he claims to have discovered. *Wong Sun* v. *United States,* 371 U.S. 471, 484; *Byars* v. *United States,* 273 U.S. 28, 29.

"material things." See *Olmstead,* at pp. 464-465. If that be their meaning, the *dicta* represent a curious process of reasoning and inversion of Fourth Amendment protections. Of course, a valid search warrant, consistent with the Fourth Amendment, must be for "material things." Otherwise the well-established Fourth Amendment protection (see the authorities cited, *supra,* pp. 33-34) against searches for evidence would be violated. But that well-established protection supplies no basis for the proposition that Americans are without constitutional protection against unreasonable police searches of their homes so long as nothing tangible is seized in the process. Such a rule would convert the Fourth Amendment guarantee against searches and seizures into a guarantee against concrete seizures only.* Whatever may have been the intended meaning of the *Olmstead dicta, Gouled* has been cited frequently, generally and without limitation

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* The majority decision in *Olmstead* has, as a practical matter, been nullified in its own field of wire tapping by *Nardone* v. *United States,* 302 U.S. 379. A number of Justices, dissenting on facts not close to those here, have explicitly called for the overruling of *Olmstead,* see *Goldman* v. *United States,* 316 U.S. 129, 136, 141 (Chief Justice Stone and Justices Frankfurter and Murphy); *On Lee* v. *United States,* 343 U.S. 747, 758, 761, 762 (Justices Frankfurter and Douglas); or have quoted with approval the *Olmstead* dissent by Justice Brandeis; see *Davis* v. *United States,* 328 U.S. 582, 607-609 (Justices Frankfurter and Murphy); *Harris* v. *United States,* 331 U.S. 145, 159 (Justices Frankfurter, Rutledge and Murphy); *Poe* v. *Ullman,* 367 U.S. 497, 550 (Justice Harlan). However, such life as is still left in *Olmstead* need not be wiped out for reversal in this case. Here, unlike *Olmstead,* there was physical entry into a home by a Government informer whose role as such was hidden by deception.

to written statements or other "tangible things", both before* and since** *Olmstead.*

Were a line to be drawn under the Fourth Amendment between verbal statements and written statements, the line would more sensibly prohibit the Government's use of verbal statements. Generally a writing speaks for itself. But a Government informer,

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* See *McGuire* v. *United States,* 273 U.S. 95, 99 (relying on *Gouled* and other cases, the Court states: "The Fourth and Fifth Amendments protect every person from the invasion of his home by federal officials without a lawful warrant and from incrimination by evidence procured as a result of the invasion."); *Byars* v. *United States,* 273 U.S. 28, 32 (relying on *Gouled* and *Boyd,* the Court states: ". . . the Court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' *Boyd* v. *United States,* 116 U.S. 616, 635; *Gouled* v. *United States, supra,* p. 304.").

** See *Grau* v. *United States,* 287 U.S. 124, 128; *Harris* v. *United States,* 331 U.S. 145, 150; *Abel* v. *United States,* 362 U.S. 217, 253 (dissenting opinion of Justice Brennan for himself, the Chief Justice and Justices Black and Douglas); *Ker* v. *California,* 374 U.S. 23, 53 (the dissenting opinion of Justice Brennan for himself, the Chief Justice and Justices Douglas and Goldberg quotes from *Gouled* for the rule that: "a search would violate the Fourth Amendment if the entry were illegal whether accomplished 'by force . . .' or 'obtained by stealth instead of by force or coercion.'"); *Gatewood* v. *United States,* 209 F. 2d 789, 791n (C.A. D.C.); *Nueslein* v. *District of Columbia,* 115 F. 2d 690, 693n (C.A. D.C.); *United States* v. *Guerrina,* 112 F. Supp. 126, 129 (E.D. Pa.); *United States* v. *General Pharmacal Company,* 205 F. Supp. 692, 694 (D.C. N.J.) (relying upon *Gouled* and other cases, the Court states: "The law is clear that a statement obtained as a result of an unreasonable search and seizure will be suppressed . . . The cases also hold that where entry into a defendant's premises is procured by fraud or misrepresentation, such entry is not by consent, and whatever is obtained as a result of such an illegal search and seizure is inadmissible in a federal criminal trial.").

for various reasons, may falsify, exaggerate or misinterpret what an accused said subject only, as here, to his word against the word of the accused. Cf. *Miranda* v. *Arizona,* 384 U.S. 436; *Crooker* v. *California,* 357 U.S. 433, 447 (dissenting opinion of Justice Douglas for four members of the Court). Some such consideration probably influenced the five to four majority in *On Lee* v. *United States,* 343 U.S. 747, to permit the use against a defendant of incriminating admissions made by him to a secret Government informer but testified to by a regular Narcotics Bureau officer who heard the admissions as instantaneously and electronically transmitted to him by the informer. The *On Lee* majority opinion distinguished *Gouled* on the basis of its being "inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods." *On Lee,* at p. 753. The admissions used in *On Lee* were made in the public room of a laundry or on the street. So the case is clearly distinguishable from this case where no electronic devices were used and, more importantly, where Partin sought, allegedly got, and testified to incriminating admissions obtained from Petitioner Hoffa by entries into Petitioner Hoffa's living quarters—an area at the very center of Fourth Amendment protection.*

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* So much should suffice for the inapplicability of *On Lee* to the facts here. Nevertheless if in the Court's view we be wrong on these distinctions, we would ask the Court to overrule *On Lee* or limit it to its facts. We would rely on (1) all the reasons and authorities advanced in our argument; (2) the dissents of Justices Black, Frankfurter, Douglas and Burton in *On Lee;* and (3) the fact that *On Lee* has lost any practical importance in view of the Court's later decision in *Massiah* v. *United States,* 377 U.S. 201.

Partin's search offended the Fourth Amendment because it occurred in a residence, entry into which was obtained by deception; because it intruded upon councils of the defense while Petitioner Hoffa was on trial; was of extended duration; and was made without probable cause.

"This Court through the years has not taken a literal or mechanical approach to the question of what may constitute a search or seizure" in contravention of the Fourth Amendment. *Lanza* v. *New York,* 370 U.S. 139, 142. Rather the Court has viewed the Fourth Amendment as requiring a liberal construction (*Byars* v. *United States,* 273 U.S. 28, 32; *United States* v. *Lefkowitz,* 285 U.S. 452, 464) to prevent its impairment "by judicial sanction of equivocal methods" (*Byars,* at pp. 33-34). As the Chief Justice observed for the Court in *Spano* v. *New York,* 360 U.S. 315, 321, the Court's "duty to enforce federal constitutional protections does not cease" as "the methods used to extract confessions [become] more sophisticated." Yet, the methods used by Sheridan here were "equivocal" only in the sense of deception of the accused; and they were hardly "sophisticated." Sheridan through Partin simply made, without warrant, a general search for evidence in a man's home. The members of the Court may well disagree on the subtleties and complexities of such cases as *Abel* v. *United States,* 362 U.S. 217, and *Frank* v. *Maryland,* 359 U.S. 360. This case presents no such subtleties and complexities. *Go-Bart* and *Gouled,* not distinguishable on any material point, require reversal here in accordance with every rule of Fourth Amendment protection and the authorities thereunder. There would be nothing left of the protection of a citizen against Government intrusion into his home, or his protection against

searches without warrant, or his protection against general searches, or his protection against searches for evidence, if the Government can join with anyone in some relation to the citizen (business, family, friendship, or social) to subvert it all.

II.

THE INCRIMINATING STATEMENTS ALLEGEDLY OBTAINED BY PARTIN WERE INADMISSIBLE BECAUSE PARTIN ELICITED THEM IN VIOLATION OF PETITIONER HOFFA'S RIGHT UNDER THE SIXTH AMENDMENT TO BE FREE OF GOVERNMENT INTRUSION ON HIS TEST FLEET DEFENSE PREPARATIONS AND CONSULTATIONS

Point I concerned the heart of the Fourth Amendment guarantees—the right of a man in the privacy of his home to be free of unreasonable Government intrusion. This Point II concerns the heart of the Sixth Amendment guarantees—the right of a man on criminal trial to prepare and present his defense with the effective assistance of counsel. In the exercise of that right while on trial in the Test Fleet case, Petitioner Hoffa was entitled to be free of any Government intrusion whether it consisted of the mere official presence of a Government representative at defense consulations,* or a Government agent's eavesdropping on defense consultations by wiretap or otherwise,** or, as

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* See *Hunt* v. *Blackburn*, 128 U.S. 464, 470; *United States* v. *Lebron*, 222 F.(2) 531, 534 (C.A. 2), cert. den. 350 U.S. 876; *McBride* v. *State*, 121 Tex. Crim. 549, 51 S.W. (2) 337; *Ex Parte Qual'3*, 58 Cal. App. (2) 330, 136 P. (2) 341; *Louie Yung* v. *Coleman*, 5 F. Supp. 702 (S.D. Idaho).

** *Coplon* v. *United States*, 191 F.(2) 749 (C.A.D.C.), cert. den. 342 U.S. 926; *State* v. *Cory*, 62 Wash. (2) 371, 382 P. (2) 1019; see in *Black* v. *United States*, Oct. Term 1965, No. 1029, the Solicitor General's Memorandum and the Court's response (384 U.S. 983), both concerned in part with the Government's electronic eavesdropping on defense consultations.

was perpetrated in Petitioner Hoffa's case, a complete invasion of the defense by a secret Government agent present, eavesdropping, associating and participating in the defense preparations and consultations as a defense helper.*

Government agent Partin, in carrying out the Government's instructions to look for evidence of tampering with the Test Fleet jury, inevitably sought to find such evidence in the councils of the Test Fleet defense. To that end, he became a defense helper in the midst of defense preparations, consultations and talks everywhere—at defense headquarters (Petitioner Hoffa's suite), at the courthouse, at meals, and going to and from the courthouse and meals. With the Government's continuing approval (Partin reported to Sheridan daily) and to the Government's continuing profit (besides the admissions claimed by Partin, the Government got and used Test Fleet defense information), Partin stayed in the midst of defense preparations and consultations throughout the Test Fleet trial. The Government thus achieved not just an intrusion upon, but a pervasive infiltration of, the whole of the Test Fleet defense. The many details of the Government's infiltration are set forth at pp. 10-13, supra. In sum,

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* *Caldwell* v. *United States*, 205 F. 2d 879 (C.A. D.C.); *Fusco* v. *Moses*, 304 N.Y. 424, 107 N.E. 2d 581; cf. *Glasser* v. *United States*, 315 U.S. 60 (intrusion on the whole of defense preparations and consultations by the trial court's appointment of Glasser's counsel to represent a co-defendant with conflicting interests); *United States* v. *Venuto*, 182 F. 2d 519 (C.A. 3) (intrusion on part of defense consultations by the trial court's securing of an agreement of no consultation between defendant and his counsel during an overnight break in cross-examination of the defendant).

the Government had a "Fifth Column" in the defense camp.*

The Government's activities were almost precisely the same as the Government's activities described and condemned in *Caldwell* v. *United States,* 205 F. 2d 879 (C.A. D.C.). In *Caldwell,* the Government instructed its secret agent Bradley to get evidence on an alleged criminal plot by Caldwell to steal Government files. The files pertained to the criminal case (jury tampering) then about to be tried against Caldwell. Here the jury tampering evidence sought pertained to the Test Fleet case then being tried against Petitioner

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* An appeal from the denial, without a hearing, of a motion for a new trial in this very case is now pending before the Court of Appeals for the Sixth Circuit. It presents the question whether these convictions can constitutionally stand in view of the admitted fact that the Government had still another secret informer, one Vick, in the midst of defense councils in this very proceeding—a Government agent who like Partin reported defense strategy in this case to the Government. Vick was an employee of Petitioner Hoffa's defense counsel.

FBI records and Sheridan's notes disclosed that Vick had been reporting defense plans to the FBI or Sheridan, or both, before and after indictment herein and while defense preparations were being made for the trial below.

Sheridan's notes of his conversations with secret Government informer Vick showed that Vick had informed Sheridan of: (1) discussions between Petitioners' counsel and prospective counsel for a co-defendant; (2) a proposed defense to Count I of the indictment; (3) the names and activities of other investigators who were employed by defense counsel; (4) a background investigation being made for cross-examination of a prospective Government witness; (5) an investigation being made to determine whether the Jury Commission was properly constituted; and (6) an investigation being made of alleged misconduct of the foreman of the grand jury which indicted Petitioners.

Sheridan has admitted that the notes of the Vick conversations were made by him, but sought to explain them as information properly obtained in seeking information of "illegal" activities.

Hoffa. In *Caldwell,* Judge Washington, speaking for a unanimous Court, consisting of Judges Washington, Miller and Edgerton, states:

> In his dual capacity as defense assistant and Government agent, Bradley so conducted himself that he gained free access to the planning of the defense . . . he was never refused admission into . . . [the defense counsel's] conferences with witnesses or lawyers. He could come and go freely and did not hear some witnesses because he had no opportunity to do so . . . Neither his dealings with the defense nor his reports to the prosecution were limited to the proposed unlawful acts of the defense: they covered many matters connected with the impending trial. The earlier inhibition against his working for the defense went overboard. The prosecution may have deplored Bradley's activity for the defense, but it knew that it was going on, got full reports on it (sometimes two or three times a day), and made little or no effort to stop it. The alleged plan to steal the files was never carried out. The trial of Caldwell proceeded with Bradley ostensibly continuing to "aid" the defense but also reporting to the prosecution. (*Caldwell,* at p. 880)

As it was with the Government and Bradley in *Caldwell,* so it was here with the Government and Partin, except that the Government never "inhibited," "deplored," or "made [any] effort to stop" Partin's infiltration of the Test Fleet defense.

Nor were the alleged admissions from Petitioners King and Hoffa any the less the immediate results of the Government's Sixth Amendment violation because no one else engaged in the defense was present and participating when Partin heard or overheard them. Partin admits that defense counsel were sometimes "close" but not "in on the conversation" (R. 271).

This concession by Partin highlights the fact on this record of a single line of Government-Partin action designed to secure evidence of jury tampering by Partin's acting as defense assistant in violation of the Sixth Amendment. The primary product was the objective sought by the violation, i.e., the claimed evidence of jury tampering; the by-product, and bonus as it were, was Test Fleet defense information. Both product and by-product were gotten by one man, Partin, in "one continuous process" (*Leyra* v. *Denno*, 347 U.S. 556, 561), one set of places (Petitioner Hoffa's suite, the courthouse, etc.), and one period of time. Both product and by-product were reported daily to the Government in one set of reports. The two cannot sensibly be separated.* Even less so can the main product and objective of an unconstitutional process be separated from that process.**

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* Otherwise, the informer would be playing a tainted role when conversing with the defendant about trial strategy or while attending a conference between the defendant and counsel, whereas the taint would momentarily disappear if the same conversation turned to another topic or if the informer and the defendant moved away from counsel to a corner of the same room. Manifestly, any such fragmentation of the informer's conduct and the defendant's rights would condone the Government's real offense, its infiltration of the defense of a criminal charge.

** Cf. *Leyra* v. *Denno, supra* (a second and voluntary confession *held* invalid as inseparable from an earlier and coerced confession); *White* v. *Maryland*, 373 U.S. 59 (Government use at trial of guilty plea entered without assistance of counsel and then withdrawn *held* invalid); *Wong Sun* v. *United States*, 371 U.S. 471 (incriminating statement made shortly after illegal arrest *held* inseparable from the illegal arrest); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (*held:* the Government cannot validly subpoena documents which it originally saw in course of a Fourth Amendment violation); *Somer* v. *United States*, 138 F. 2d 790 (C.A. 2) (*held:* information gained from illegal search of defendant's apartment will not support his arrest thereafter).

Any conviction in the Test Fleet case would have been plainly invalid because of the Government's violation of the Sixth Amendment.* The question presented is whether Petitioners' convictions, based on admissions claimed by Partin, are valid even though the getting of those admissions required violation of the Sixth Amendment, and even though the admissions, themselves, were the very objective and the immediate gains from that violation.

Abstractly, the question would appear to be whether in a trial of the defendant on offense B, the Government can validly use evidence of that offense obtained by violating the defendant's Sixth Amendment right to counsel in the trial of offense A, a separate and different offense. But an affirmative answer to that question would not govern our case. The Test Fleet trial and the jury tampering trial are closely connected; the one grew out of the other. The Government's need for evidence of jury tampering was the cause of the unconstitutional invasion of the Test Fleet defense. Government agent Partin, paid by the Government as late as the fall of 1963 (see p. 22, *supra*) was still, at an earlier point in that year, soliciting information from Petitioners' counsel and informing to the Government on the defense plans of Petitioners in connection with the grand jury inquiry in this very proceeding (see p. 20, *supra*).

But even if *Test Fleet* and this case were not closely connected, the Government could not validly use the alleged admissions derived from its violation of the

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* *Caldwell* v. *United States, Coplon* v. *United States, State* v. *Cory, Fusco* v. *Moses, McBride* v. *State, Ex Parte Qualls,* all *supra;* see *United States* v. *Lebron,* 222 F. 2d 531, 534 (C.A. 2), cert. den., 350 U.S. 876; cf. *Glasser* v. *United States* and *United States* v. *Venuto,* both *supra.*

Sixth Amendment in *Test Fleet*. On this question, there is no precise precedent which involved two separate trials. However, every relevant line of authority under closely related provisions of the Bill of Rights, and every consideration pertinent to the judicial application of the Bill of Rights, points strongly and, in our view, inescapably to the invalidity of Petitioners' convictions.

Evidence which is the product, direct or indirect, of the Government's violation of a defendant's rights under the Fourth Amendment cannot validly be used in any way to secure his conviction on any offense.* There are many reasons for applying the same rule to evidence which is the objective and direct product of a Sixth Amendment violation. As the Court stated in *McNabb* v. *United States*, 318 U.S. 332, 339, and again in *Mapp* v. *Ohio*, 367 U.S. 643, 649: "A conviction in the Federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand." And the Court has repeatedly observed that the Sixth Amendment right to counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." See *Powell* v. *Alabama*, 287 U.S. 45, 67; *Johnson* v. *Zerbst*, 304 U.S. 458, 462; *Avery* v. *Alabama*, 308 U.S. 444, 447; *Glasser* v. *United States*, 315 U.S. 60, 76; *Gideon* v.

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* *Wong Sun* v. *United States*, 371 U.S. 471, 485; *Mapp* v. *Ohio*, 367 U.S. 643, 648, 649, 656, 657; *Elkins* v. *United States*, 364 U.S. 206, 212-213, 223; *Taylor* v. *United States*, 286 U.S. 1, 6; *United States* v. *Lefkowitz*, 285 U.S. 452, 466-467; *Ker* v. *California*, 374 U.S. 23, 30; *Agnello* v. *United States*, 269 U.S. 20, 33-34; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392; *Boyd* v. *United States*, 116 U.S. 616, 633; *McDonald* v. *United States*, 335 U.S. 451, 457 (concurring opinion).

Wainwright, 372 U.S. 335, 342-343, 349; *Malloy* v. *Hogan,* 378 U.S. 1, 6.

A basic reason for prohibiting the Government's using any advantage gained from a Fourth Amendment violation is that the prohibition is needed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U.S. 206, 217; *Mapp* v. *Ohio,* 367 U.S. 643, 656.*

The reason applies even more cogently to a Sixth Amendment violation. For the perpetrators of Fourth Amendment violations are punishable by damages in tort, and in some states by imprisonment and fine, albeit any actual punishment, civil or criminal, is rare;** but legal theories and statutes have yet to be worked out for punishment of Sixth Amendment violations by civil damages or criminal penalty.

Other basic reasons for prohibition of any Government advantage from a violation of the Constitution are equally applicable to Sixth Amendment violations. Here, as in *Elkins* v. *United States,* 364 U.S. 206, 222-223, lest the law is to make "accomplices" of Federal judges, "no distinction can be taken between the Government as prosecutor and the Government as judge"; and hence, "the imperative of judicial integrity" required the exclusion of Partin's claimed admissions, permeated as they were by the Government's

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* Cf. *Upshaw* v. *United States,* 335 U.S. 410, 412, where the same practical consideration of securing compliance results in the same prohibition being applied to enforcement of Rule 5(a) of the Federal Rules of Criminal Procedure directed against unnecessary delay in preliminary hearing before a magistrate.

** See *Neuslein* v. *District of Columbia,* 115 F. 2d 690, 695n (C.A. D.C.).

violation of the Sixth Amendment. See also *Olmstead* v. *United States,* 277 U.S. 438, 470 (Justice Holmes dissenting); cf. *Shelley* v. *Kraemer,* 334 U.S. 1. Here, as in *Watts* v. *Indiana,* 338 U.S. 49, 55-56, Partin's interrogation of Petitioners Hoffa and King "for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system," and the product of the interrogation must be barred.

Finally the Sixth Amendment, like the Fourth Amendment, is one of the "things in our protective scheme of civil rights . . . entrusted to the judiciary" and "judicial controls should be meticulously respected." See *Abel* v. *United States,* 362 U.S. 217, 247 (Justice Douglas dissenting, with Justice Black) and 252 (Justice Brennan dissenting, with the Chief Justice and Justices Black and Douglas). For the Government's infiltration of the Test Fleet defense, and the avoidance of like action tomorrow, there is no judicial control other than to reverse Petitioners' convictions. "To hold otherwise is to grant the right" conferred by the Sixth Amendment "but in reality to withhold its privileges and enjoyment." See *Mapp* v. *Ohio,* 367 U.S. 643, 656.

III.

THE INCRIMINATING STATEMENTS ALLEGEDLY OBTAINED BY PARTIN IN THE LATTER PART OF HIS INTERROGATIONS FOR THE GOVERNMENT WERE INADMISSIBLE BECAUSE PARTIN GOT THEM IN VIOLATION OF THE SIXTH AMENDMENT RIGHTS OF PETITIONERS HOFFA AND KING TO COUNSEL IN THIS PROCEEDING.

The Government's objective in its use of Partin was to find any evidence on which Petitioner Hoffa and his associates could be convicted of jury tampering or other illegal activity. Partin was instructed to get such evidence. His questioning of Petitioners Hoffa and King was unquestionably "intended to convict" them. This kind of governmental process carried on in the absence of counsel and without advice of right to counsel "is a real peril to individual freedom." Cf. *Watts* v. *Indiana*, 338 U.S. 49, 59 (concurring opinion); *Jackson* v. *United States*, 337 F. 2d 136, 140 (C.A. D.C.) cert. den., 380 U.S. 935. It presents a nice question of violation of the Sixth and Fifth Amendments. Cf. *Watts* v. *Indiana*, 338 U.S. 49, 55-56; *Jackson* v. *United States, supra*, at p. 144 (C.A. D.C.) (Judge Fahy dissenting); and *Henderson* v. *United States*, 12 F. 2d 528. But this we pass over.

Not later than October 25, the Government had evidence from Partin to charge a criminal conspiracy between Petitioners Hoffa and King to influence the Test Fleet jury and the carrying out of that conspiracy by the offer of a bribe to juror Tippens. See at pp. 14-15 *supra*, the admissions claimed by Partin to have been made on October 22, the day of his arrival in Nashville, on October 23 and on October 25. Not later than October 25, the Government had sufficient ground for taking Petitioners Hoffa and King into custody, and for charging them with jury tampering. Cf. *Coplon* v.

United States, 191 F. 2d 749, 752, 754 (C.A. D.C.), cert. den., 342 U.S. 926; *United States* v. *Coplon*, 185 F. 2d 629, 635 (C.A. 2), cert. den., 342 U.S. 920. Had the Government done either, or both, any admissions claimed by Partin to have been made thereafter would have been barred by the Sixth Amendment.* Had the Government done either or both, it could have continued with other efforts and questioning concerned with jury tampering, but it could not have continued to question Petitioners Hoffa and King without observance of their Sixth Amendment rights.

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* *Escobedo* v. *Illinois*, 378 U.S. 478 (a citizen in custody but not charged when interrogated by police); *Massiah* v. *United States*, 377 U.S. 201 (a citizen when interrogated by a secret Government agent was not in custody but charged by indictment, later superseded by indictment with additional counts); *Brubaker* v. *Dickson*, 310 F. 2d 30 (C.A. 9), cert. den., 372 U.S. 978 (a citizen in custody but merely "booked" when interrogated by the police); *United States ex rel Russo* v. *State of New Jersey*, 351 F. 2d 429 (C.A. 3) (a citizen under arrest and in custody when interrogated by the police); *Queen* v. *United States*, 335 F. 2d 297 (C.A. D.C.) (a citizen arrested and released on bail during continuance of preliminary hearing when interrogated by police); *Ricks* v. *United States*, 334 F. 2d 964 (C.A. D.C.) (a citizen in custody pending preliminary hearing when interrogated by police); *Lee* v. *United States*, 322 F. 2d 770 (C.A. 5) (a citizen indicted and in custody when interrogated by police); *People* v. *Furnish*, 47 Cal. Rep. 387, 407 P. 2d 299 (a citizen in custody but not charged when interrogated by police); *People* v. *Dorado*, 42 Cal. Rep. 169, 398 P. 2d 361 (a citizen in custody but not charged when interrogated by police); *People* v. *Wallace*, 17 A.D. 2d 981, 234 N.Y.S. 2d 579 (2nd Dept.) (a citizen charged with arson only by affidavit of the Fire Marshal and not in custody when interrogated by the Fire Marshal). *On Lee* v. *United States*, 343 U.S. 747, is not an authority to the contrary. In *On Lee*, as explicitly noted by the Court, a Fourth Amendment contention was the only constitutional issue urged and the only one decided. See *On Lee*, at pp. 750-751; cf. *Massiah* v. *United States*, 377 U.S. 201.

The Government neither placed Petitioners Hoffa and King in custody, nor charged them. It chose to continue in hiding behind the further conversations of its secret agent Partin with those Petitioners. The Government made no disclosure to them of the fact that one who talked with Partin faced his Government. The Government did not warn them of any rights to counsel—although Petitioner Hoffa's counsel were but a step away. So the Government got the admissions allegedly heard by Partin on October 26, 29 and 30, November 5, 7, 14, 15 and 20, and December 3 through December 7, (see pp. 15-18, *supra*); and, by use of those alleged admissions at trial, the Government secured the convictions of all Petitioners.

We urge that the Government's choice of continuing deception after cause for arrest and charge did not avoid the safeguards of the Sixth Amendment.

This Court has already held the constitutional right to counsel applicable in circumstances where there was no custody or charge of any kind. *Reece* v. *Georgia,* 350 U.S. 85; see also *In re Groban,* 352 U.S. 330, 337ff. (Justice Black dissenting, with the Chief Justice and Justices Douglas and Brennan); *State* v. *Hall,* 88 Ida. 117, 129-131, 397 P. 2d 261, 268-269 (concurring opinion); Cf. *People* v. *Allen,* 35 L.W. 2063 (N.Y. Sup. Ct., Kings Co. 7-22-66). Where the circumstances are appropriate, the absence of custody and charge is no bar to Sixth Amendment rights. That much is settled by *Reece* v. *Georgia.*

The circumstances here are appropriate for application of the Sixth Amendment. Partin's pre-trial discovery by his deceptive interrogation of Petitioners nullified their rights to counsel at trial. See *Escobedo* v. *Illinois,* 378 U.S. 478, 487; *Queen* v. *United States,* 335 F. 2d 297, 298 (C.A.D.C.); *Jackson* v. *United*

States, 337 F. 2d 136, 144 (C.A. D.C.), cert. den., 380 U.S. 935 (Judge Fahy dissenting on issue of waiver of counsel). Partin's narration at trial of his alleged pre-trial interrogation of Petitioners rendered the efforts of their trial counsel largely useless. That narration forced the relinquishment of the Fifth Amendment rights of Petitioners Hoffa and King against self-incrimination at trial. See *Lee* v. *United States,* 322 F. 2d 770, 776 (C.A. 5).

Police brutality in securing incriminating statements is the exception today, as the police, State and Federal alike, have heretofore relied on the mean and partial deceptions made possible by in-custody questioning without observing rights to counsel. *Miranda* v. *Arizona,* 384 U.S. 447, 450-455. Here, as in *Massiah* (see *Massiah,* 377 U.S. at p. 206), the Government obviated the need for small, in-custody deceptions, as Petitioners King and Hoffa were overwhelmed (allegedly) by the one big deception of Partin as secret Government agent and defense helper. Most of the cases on Sixth Amendment rights have been concerned with the activities of known agents of the Government. See p. 54n, *supra.* In the future, the cases will surely be mostly concerned with the activities of secret informers—if the Government here has found a constitutional way to evade *Massiah, Escobedo* and *Miranda.*

But most importantly, the Government by October 25 was not engaged in a general investigation of an unsolved crime. See *Escobedo, supra,* at p. 485; *Watts* v. *Indiana,* 338 U.S. 49, 54-55; *State* v. *Hall,* 88 Ida. 117, 129-131, 397 P. 2d 261, 268-269 (concurring opinion); cf. *Hershkowitz* v. *United States,* 65 F. 2d 920. On or about that date, the Government had enough evidence to arrest Petitioners Hoffa and King and take them

into custody on the charge of jury tampering. The incriminating statements allegedly obtained after that point must be held inadmissible. Under a Bill of Rights intended to protect the citizen against his Government, the applicability of the Sixth Amendment cannot be left to the prosecutor's choice of continued deception rather than arrest and charge.

Just as fraud is the equivalent of force under the Fourth Amendment (Point I), so, in the circumstances here, continued deception after arrest and charge can be made is under the Sixth Amendment the equivalent of charge or custody. In the one case as in the other, the constitutional guarantee would otherwise be subverted.*

IV.

THE INCRIMINATING STATEMENTS ALLEGEDLY OBTAINED BY PARTIN IN THE LATTER PART OF HIS INTERROGATION FOR THE GOVERNMENT WERE INADMISSIBLE BECAUSE PARTIN ELICITED THEM IN VIOLATION OF THE FIFTH AMENDMENT RIGHTS OF PETITIONERS HOFFA AND KING AGAINST SELF-INCRIMINATION

The Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination are intimately related; for it is the observance of the Sixth Amendment right which protects the exercise of the Fifth Amendment right. Cf. *Escobedo* v. *Illinois,* 378 U.S. 478, with *Miranda* v. *Arizona,* 384 U.S. 436. The

* The rule of inadmissibility we ask for on this point is no radical new thing in the world. Even in the absence of any Government deception, England, Scotland and our own military jurisdiction go further in forbidding the use of incriminating statements obtained in the absence of counsel by Government questioning of a definite suspect, regardless of charge or custody. *Culombe* v. *Connecticut,* 367 U.S. 568, 589, 593; see *Lee* v. *United States,* 322 F. 2d 770 (C.A. 5) and the decisions of the United States Court of Military Appeals cited therein.

same authorities and reasons advanced in Point III, *supra,* for the Sixth Amendment's barring of the admissions allegedly obtained after October 25 call for the barring of those admissions by the Fifth Amendment's provision against self-incrimination. Indeed, those authorities and reasons apply with even more force to self-incrimination. Consideration of the Sixth Amendment in the context of Point III turns upon the question of at what point in time the right to counsel begins. The privilege against self-incrimination is always with a man, regardless of his being charged or in custody. *Brock* v. *United States,* 223 F. 2d 681 (C.A. 5); *United States* v. *Lipshitz,* 132 F. Supp. 519 (E.D. N.Y.); *United States* v. *Guerrina,* 112 F. Supp. 126 (E.D. Pa.); *Rochin* v. *California,* 342 U.S. 165, 175, 177 (concurring opinions of Justices Black and Douglas); *In re Groban,* 352 U.S. 330, 335-337, 344 (concurring opinion of Justices Frankfurter and Harlan; and dissenting opinion of Justice Black, joined by the Chief Justice and Justices Douglas and Brennan); *Irvine* v. *California,* 347 U.S. 128, 139 (dissenting opinion of Justices Black and Douglas); see *Griswold* v. *Connecticut,* 381 U.S. 479, 484.

Brock barred the use of incriminating statements made to a Government agent in response to suggestive questions addressed to a citizen still groggy from sleep. The citizen was neither charged nor in custody and, unlike the case here, the Government at the time of questioning did not have a basis for charging or arresting. The Court of Appeals for the Fifth Circuit ruled broadly:

> Evidence obtained at the end of a whip is no less voluntary than that obtained by insidious and

> more subtle means where the opportunity to exercise the right against self-incrimination is absent. Before a man can be compelled to testify against himself, he must have a fair chance to exercise his rights under the Fifth Amendment. (p. 685)

The authorities just cited strongly suggest the rightness of barring all of Partin's claimed admissions and not merely the barring of those obtained after October 25.*

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* *Guerrina* and *Lipshitz* held the Fifth Amendment violated by the failure of an Internal Revenue Service agent, investigating a possible criminal violation, to advise a taxpayer of his right to remain silent. In both cases, the taxpayer was neither charged nor in custody and, unlike the case here, the Government did not have a basis for charging or arresting.

The concurring Justices in *Rochin*, the concurring Justices and the dissenting Justices in *Groban*, and the dissenting Justices in *Irvine*, applied the right against self-incrimination in cases where there was neither custody nor charge, nor any basis for either. In none of the cases was such application rejected by the majority decision. The *Rochin* majority found a violation of due process; the *Groban* majority saw the facts differently in rejecting a Sixth Amendment claim; and the *Irvine* majority found a violation of the Fourth Amendment, but applied the now discredited doctrine of *Wolf* v. *Colorado*, 338 U.S. 25. The self-incriminating evidence in these three cases was obtained by legal or actual compulsion, albeit the legal compulsion in *Irvine* was somewhat attenuated since a gambler can give up the unlawful occupation of bookmaking rather than apply for a Federal wagering stamp. Here, a broad ruling in bar of all of the alleged admissions would be supported by the Government's trickery in depriving Petitioners Hoffa and King of the opportunity to exercise their rights against self-incrimination. Compare the argument made at pp. 35-38, *supra*.

V.

CONVICTION UPON THE ADMISSIONS ALLEGEDLY OBTAINED BY PARTIN IN HIS INTERROGATION FOR THE GOVERNMENT DENIED DUE PROCESS OF LAW TO ALL PETITIONERS

On this point, we adopt the most restrictive of the Court's various approaches to constitutional liberties. In reliance on the "whole course" of the Government-Partin "proceedings," we urge that Petitioners' convictions "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" (*Rochin* v. *California*, 342 U.S. 165, 169).

Government use of a secret informer is a shabby thing in any case. But that is only the beginning of the facts in this case. There is a high risk of perjury in the testimony of any secret informer. With the Government's employment of Partin as its secret informer, the risk of perjury was at its highest. At the very outset of his Government work, and throughout his Government work, Partin had five, highly persuasive reasons for making sure that the Government would find his work helpful. The five reasons were charges of embezzlement, kidnapping, manslaughter, assault and perjury. The embezzlement charge was a Federal one, and the other four were State charges. The Government could control non-prosecution of the one, and secure the cooperation of the State officials on the others. See pp. 5-6 and 20-21, *supra*.* Partin would want also to earn the Govern-

* An appeal from the denial, without a requested hearing, of a motion for a new trial is now pending before the Court of Appeals for the Sixth Circuit (see p. 46n, *supra*). It presents, in addition to the Vick matter, the questions of the alleged suppression of evidence by Partin and United States marshals which would have

ment's payments to his wife, no matter for what purpose (see pp. 28-29, *supra*) those payments were made. There comes a point when the risk of perjury in the

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shown that Partin had been a narcotics addict at the time he obtained the alleged incriminating statements, and at about the same time he was engaged in an effort to frame Petitioner Hoffa in order to obtain his own release from jail.

In support of that motion and a further motion for remand filed in the Court of Appeals, Partin's cellmate as of October, 1962, Sidney Simpson, stated as follows (R. 171-172):

> "Sometime in September, 1962, I was transferred from the Donaldsonville Parish Jail to the Baton Rouge Parish Jail. I was placed in a cell with Partin. For the first few days, Partin acted sort of brave. Then when it was clear that he was not going to get out in a hurry, he became more excited and nervous. After I had been in the same cell with Partin for about three days, Partin said, 'I know a way to get out of here. They want Hoffa more than they want me.' Partin told me that he was going to get one of the deputies to get Bill Daniels. Bill Daniels is an officer in the State of Louisiana. Partin said he wanted to talk to Daniels about Hoffa. Partin said that he was going to talk to Captain Edwards and ask him to get Daniels. A deputy, whose name is not known to me, came and took Partin from the cell. Partin remained away for several hours.
>
> A few days later Partin was released from the jail. From the day when I first saw the deputy, until the date when Partin was released, Partin was out of the cell most of the day and sometimes part of the night. On one occasion Partin returned to the cell and said, 'It will take a few more days and we will have things straightened out, but don't worry.' Partin was taken in and out of the cell frequently each day. Partin told me during this time that he was working with Daniels and the FBI to frame Hoffa. On one occasion I asked Partin if he knew enough about Hoffa to be of any help to Daniels and the FBI, and Partin said, 'It doesn't make any difference. If I don't know it, I can fix it up.'
>
> While we were in the cell, I asked Partin why he was doing this to Hoffa. Partin replied: 'What difference does it make? I'm thinking about myself. Aren't you thinking about yourself? I don't give a damn about Hoffa . . .'"

Partin denied the foregoing.

testimony of a Government informer is so strong that a conviction secured by such testimony cannot stand. *Mesarosh* v. *United States,* 352 U.S. 1.*

Yet there was more than the strong risk of perjury to make the whole of the Government-Partin process unconscionable. Certainly the Government ignored Sixth Amendment rights in the Test Fleet case. Certainly, too, putting aside for the moment all of our other legal contentions, the Government in the totality of its conduct was, at a minimum, within the penumbra of practically every Fourth Amendment guarantee, of Sixth Amendment rights to counsel in this proceeding, and of Fifth Amendment rights against self-incrimination.** Whatever were the legal consequences of its actions, as separately measured by each such Amendment, the Government in fact did invade

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* For unstated reasons the trial court excluded testimony proffered by the defense that shortly before the trial Partin had attempted to recruit his acquaintance, Reynolds, to give perjured corroboration of Partin's forthcoming testimony (R. 1236-1252, 1268).

Partin was a 20th-century counterpart of the approvers of a bygone age—persons who, having been convicted of felony and then having accused others, were pardoned if the latter were found guilty and hanged if they were acquitted. Of the approver system, it was said, "[M]ore mischief hath come to good men by these kinds of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders." Hale, Pleas of the Crown 226 (1778).

Professional police officers, acting undercover, are superior in credibility to, and have less incentive to falsify than, non-professional "special employees." See Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L.J. 1091, 1119-1121 (1951).

** The decisions of this Court "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Griswold* v. *Connecticut,* 381 U.S. 479, 484.

the privacy of a man's home, did infiltrate the councils of his defense, and did deprive him of the opportunity to utilize his counsel and remain silent—all in one continuing process of ignoble deception directed from the start to getting the condemnation of a man before there was even the possibility of his having done anything wrong. This much, without more, is offensive to due process standards of decency and fairness. See *Lisenba* v. *California,* 314 U.S. 219, 237.

Finally, the due process clause most surely condemns trial use of the product of the Government's deception as it continued after October 25. By deferring arrest and charge and the constitutional rights attendant upon them, the Government effectively deprived Petitioners of those rights. When the Government finally chose to make the rights available by arrest and charge, their exercise had been rendered largely useless by the admissions allegedly obtained after October 25. On that date legitimate law enforcement called for arrest and charge with a fair trial to follow. The Government's persistence in the Partin deception served only the purpose of securing certain conviction by making sure that his testimony would, as it did, make Petitioners' subsequent "fair trial" a formality.

CONCLUSION

The Government's urging of the "practical" needs of law enforcement can be confidently expected. Yet "tolerance of short-cut methods in law enforcement impairs its enduring effectiveness" (*Miller* v. *United States,* 357 U.S. 301, 313). And the Government's use of contemptible methods ill serves law enforcement by incurring contempt for the law. See *Mapp* v. *Ohio,* 367 U.S. 643, 659.

The paramount fact is that "the forefathers, after consulting the lessons of history, designed our Constitu-

tion to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment" (*United States* v. *Di Re*, 332 U.S. 581, 595). The "police surveillance" by Partin was so "permeating" as to short circuit the protective power of almost all the constitutional safeguards on enforcement of the criminal laws. The underlying issue of every aspect of this case is whether Government deception which renders those safeguards useless can be left to go on uncondemned. On this issue of fraud versus the Constitution, we submit, for all of the reasons stated, that the Constitution must win. Petitioners' convictions should be reversed.

Respectfully submitted,

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